No. 80-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

—against—

STATE OF MONTANA, TED SCHWINDEN, GOVERNOR OF MONTANA, HELEN J. FEAVER, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and MAURICE L. BRUSETT, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MONTANA

AMICUS CURIAE BRIEF OF ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, AND SIERRA CLUB IN SUPPORT OF APPELLEES

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This brief addresses two questions:

1. Whether trial is necessary to apply the test of *Complete Auto Transit* v. *Brady*, 430 U. S. 274 (1977), and

2. Whether trial is necessary to evaluate the putative conflict between state and federal policy that appellants pose.

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INTEREST OF AMICI

Amici are three national organizations dedicated to protection of the environment and to the responsible use and preservation of natural resources. The combined membership of amici in the United States exceeds 275,000. All amici have a strong interest in evaluating the environmental consequences of energy development, in minimizing undesirable consequences, and in assuring that unavoidable damage to the environment be repaired insofar as possible. A more detailed description of each amicus appears in the Appendix to this brief.

In this case, appellants seek to constrict the ability of a state to impose a non-discriminatory tax, and to set aside tax revenues in a trust fund, in order to defray the costs of present and future environmental damage from coal extraction. Amici support the state's efforts to mitigate the uncertain and partially unpredictable harm to its environment.

Counsel for the parties have consented to the filing of this brief in support of appellees, and letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

At stake in this case is a state's power to levy a non-discriminatory tax on the extraction of coal, in order to defray the present and future costs of that extraction as they fall on the state's environment, economy, and society. Appellants do not contend that such taxes are invalid altogether, but they argue that in this case the Constitution requires Montana's tax to be lowered; and they insist that trial is necessary in order to quantify the short- and long-term burdens that coal extraction will impose on Montana. They also seek trial, in state court, to delineate "national energy policy," and then to set a dollar ceiling on the amount of tax Montana can levy on coal producers without "substantially frustrating" the policy thus delineated.

The constitutionality of Montana's tax can readily be determined without trial in this case, because the case in its present posture demonstrates that the tax is non-discriminatory and that it has not operated to hinder commerce in Montana coal.

The challenged tax falls with equal weight on Montana consumers and consumers out of state; its practical effect is neither discriminatory nor tailored. Manifestly, the tax is not preventing very large amounts of Montana coal from being mined and sold in interstate commerce, at prices which appellant utilities seem to find competitive with other energy sources.

Whether Montana's tax fairly relates to the burdens of coal extraction is an issue particularly unsuitable for trial. As a matter of constitutional law, the state is entitled to wide latitude in deciding what level of taxes is fairly related to the present and future impacts of extracting its non-renewable resources. In addition, the full cost of many important impacts is not quantifiable with objective precision. The degree of impacts in the future is necessarily speculative in part. Some impacts are highly subjective, such as the value of clean air and unscarred land. Other impacts may not be discovered for several years. Appellants have not suggested any judicial standards that could govern a fact-finding process, either at trial or on review.

The challenged tax does not conflict with federal statutes, as the Court can determine for itself without trial. Even assuming a partial federal policy in favor of coal development, balanced against environmental concerns and other energy sources exists, there is no discernible policy in favor of coal production in disregard of those balancing factors, or at the cheapest possible prices—the policy appellants require to support their argument. As a whole, "national energy policy" as expressed in federal statutes is a far more elusive concept than appellants contend.

ARGUMENT

I. THE "FAIRLY RELATED" ISSUE CAN AND SHOULD BE DETERMINED WITHOUT TRIAL IN THIS CASE.

Appellants concede that a coal severance tax imposed by a state is constitutional in principle. However, they argue that the Commerce Clause entitles them to have their taxes lowered in this case, to a level to be set at trial. They insist that trial is necessary to apply the test of *Complete Auto Transit* v. *Brady*, 430 U. S. 274 (1977), which requires in part that a tax be "fairly related to the services provided by the State." 430 U. S. at 279. At trial, appellants would attempt to quantify the total impacts of coal extraction on the state of Montana and to fix a dollar value on the costs of avoiding or repairing them. Appellants' brief at 12. Appellants recognize that those total impact costs are what define the permissible scope of the tax.

Amici agree that the "fairly related" test of *Complete Auto Transit* is applicable,[1] and that the total impact costs of coal extraction activity are the proper constitutional boundary for Montana's severance tax. But from those premises, the necessity for trial does not follow. Nothing in the *Complete Auto Transit* test, either as formulated or as subsequently applied by this Court, indicates that a quantification of impacts at trial is required in every case, or even that it is desirable to subject the legislative judgment of a state in this context to a detailed second-guessing.

A. Montana's severance tax is well within constitutional bounds, since it is non-discriminatory and it imposes no practical burden on interstate commerce.

In support of their argument for trial, appellants rely heavily on the claim that the challenged tax is discriminatory, and tailored to fall disproportionately on out-of-state taxpayers

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[1] Applying the practical rule of *Complete Auto Transit*, rather than the convenient but formalist rule of *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245 (1922) is consistent with recent cases. *See, e.g., Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, ____ U. S. ____, 100 S. Ct. 1223, 1234 (1980). In *Hughes* v. *Oklahoma*, 441 U. S. 322, 325 (1979), the Court discarded the similarly formalist rule of *Geer* v. *Connecticut*, 161 U. S. 519 (1896).

and consumers. But it is not. Over sixty percent of Montana's electricity customers are served by the Montana Power Co.[2] Appellants cannot be unaware that Montana Power buys coal and burns it at three large, coal-fired electric generating plants located within the state, since appellant Western Energy Co. is the sole supplier of coal for all three plants (Western Energy is a wholly owned subsidiary of Montana Power Co.).[3] Nor can they be unaware that the coal sold to Montana Power for in-state consumption is taxed at the same rate as coal sold out of state, since appellant Western Energy is the taxpayer of record for that coal.[4] In-state coal purchasers receive no tax advantage under Montana's tax. Nor is there any advantage to ultimate electricity customers located in Montana, whose electricity is made from taxed coal and who are therefore affected by the tax in exactly the same way as customers of any of the utilities seeking relief here.

In the absence of discrimination, the principal factor to be assessed is the degree of burden on interstate commerce. *Minnesota* v. *Clover Leaf Creamery Co.*, ____, U. S. ____, 49 USLW 4111, 4115 (1981):

> Since the statute does not discriminate between interstate and intrastate commerce, the controlling question is whether the incidental burden imposed on interstate com-

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[2] In calendar year 1979, Montana Power Co. sold 7,026,040,015 kilowatt-hours of electricity in Montana. *See* Montana Power Co., *Rate Increase Application,* Montana Public Service Commission Docket #80.4.2. Overall sales within the state for the same period were 11,066,000,000 Kilowatt-hours. *See* Montana Department of Natural Resources and Conservation, *Historical Energy Sales* (October 1980), at 21.

[3] *See* Securities and Exchange Commission Form 10-k, *Annual Report of Montana Power Company* dated 12-31-79, SEC file #1-4566, at 17, 25. The three plants are Colstrip Units 1 and 2, located at Colstrip, Montana (50% ownership by Montana Power Co.), and the Corette plant, located at Billings, Montana (100% ownership). *Id.*

[4] *See Statement of Coal Produced and Severance Tax for Quarter* ____, submitted quarterly by Western Energy Company to the State of Montana Department of Revenue. Together, the three in-state plants burn in excess of three million tons of coal per year. *Id.*, statements for 3-31-80, 6-30-80, 9-30-80, and 12-31-80.

merce by the Minnesota Act is 'clearly excessive in relation to the putative local benefits.' [citation omitted][5]

In this case, interstate commerce in Montana coal has flourished in the presence of the challenged tax. The tax has not prevented Montana coal production from quadrupling in the last decade,[6] nor has the tax prevented appellant utilities from buying Montana coal at what they must have considered fair and reasonable prices, in comparison to other energy sources.[7] The utility appellants here do not contend that their coal purchases would substantially increase if the challenged tax were reduced, nor that the proportion of coal they intend to rely on, as compared to other energy sources, would substantially change. Thus, even as a matter of pleading, no practical interference with interstate commerce appears in this case.[8]

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[5] The fair relation of burdens and benefits, so discussed in the quoted passage, is the non-tax equivalent of the "fairly related" test as set out in *Complete Auto Transit*. The challenged state law in *Minnesota* v. *Clover Leaf Creamery* was a ban on one type of milk container, and the Court looked to the relationship between the disadvantage to commerce on the one hand, and the advantage to the state on the other. Where the challenge is to a non-discriminatory state tax, as in *Complete Auto Transit* and this case, the disadvantage to commerce is simply the amount of the tax, and the advantage to the state is the legitimate end to which the tax revenues are put. The constitutional requirement, that there be a fair relationship between them, is the same.

[6] See the decision by the Montana Supreme Court below, 615 P. 2d 847, 849-850 (1980).

[7] Regulated public utilities are under a duty to provide service, including the generation of electricity, at reasonable cost. See, e. g., Illinois Ann. Stat. ch. 111⅔, § 32; Michigan Comp. Laws Ann. § 460.6, *General Telephone Co.* v. *Michigan Public Service Comm'n*, 78 Mich. App. 528, 260 N. W. 2d 874, 877 (1977); Minnesota Stat. Ann. § 216B.01, § 216B.03; Wisconsin Stat. Ann. § 196.03(1). It would therefore be illegal for appellant utilities to pay unreasonably high rates for their coal.

[8] For Commerce Clause purposes, burdens on taxpayers must be distinguished from burdens on interstate commerce. *Exxon* v. *Hughes*, 437 U. S. 117, 126 (1978). Montana's tax obviously raises the price of coal, and thus the cost of doing business for coal sellers; but by itself, an increased cost of doing business is unobjectionable. *See Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 254 (1938). The same is true of a regulation that raises costs to ultimate consumers. *Exxon* v. *Hughes*, *supra*, 437 U. S. at 127-128.

The teaching of *Complete Auto Transit* and succeeding cases has been to focus on the "practical effect" of a challenged statute in operation. *See, e.g., Lewis* v. *BT Investment Managers, Inc.*, ____ U.S. ____, 64 L. Ed. 2d 702, 712 (1980); *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, ____ U. S. ____, 100 S. Ct. 1223, 1234 (1980). Montana's tax has not hindered interstate commerce in practice, and it has fallen even-handedly on all commerce and all parties concerned, whether located outside the state or within its borders. Since trial is not required to determine either point, the tax should therefore be upheld.

B. States are entitled to wide latitude in gauging the present and future impact costs of developing nonrenewable resources.

Although the Commerce Clause imposes a rule of fairness, it does not require state taxes affecting interstate commerce to be narrowly constrained by a precise calculation of the burdens imposed by that commerce.

> Complete fairness would require that a state tax vary with every factor affecting appropriate compensation . . . These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision' [citation omitted].

Evansville-Vanderburgh Airport Authority District v. *Delta Airlines, Inc.*, 405 U. S. 707, 716 (1972), quoting *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 546-547 (1950). The purpose of trial in this case could only be to substitute "precision" for rough approximation, and thereby to constrict the legislative judgment of the state in gauging the present and future magnitude of coal development impacts. The Court has been invited to make this substitution before, and has declined. In *Capitol Greyhound* v. *Brice*, appellants argued that Maryland road taxes should more precisely correlate with actual road use, determined as a factual matter. The Court recognized the "infirmities" of Maryland's taxing formula, but observed that "we are by no means sure that the remedies suggested by appellants would not bring about greater ills." 339 U. S. at 546.

In the most recent case, faced with Minnesota's judgment that plastic nonrefillable milk containers posed a large enough environmental hazard to justify a total ban, the Court applied a "clearly excessive" standard to the state's assessment, and upheld the ban. *Minnesota* v. *Clover Leaf Creamery, supra,* 49 USLW at 4115-4116. If anything, the standard in this case should be even less restrictive, since the subject is a tax rather than an absolute ban on one form of commerce, and since the legislative judgment in question—Montana's assessment of the environmental, social and economic hazards of coal mining on a massive scale—covers an area much less susceptible to precise measurement. But under any standard, the Court can safely defer to Montana's judgment in this case, knowing that the practical effect of Montana's tax has been neither to hinder interstate commerce nor to discriminate against it.

Appellants argue that to uphold Montana's tax without trial in this case will be to give states unlimited discretion to raise taxes, even to 1000% or 2000%. Appellants' brief at 24. But states are not empowered to put excessive burdens on commerce; if and when Montana actually starts to constrict commerce in coal, either through taxes or otherwise, review of its legislative judgment will be available.

C. How large the burdens of present and future coal development will be on Montana's environment and economy is a question particularly suitable for legislative judgment, since the costs cannot be sharply quantified.

Some effects of coal development can be predicted, and the cost of repairing them can be quantified. But other costs are necessarily speculative. The extent to which groundwater will be polluted, and the cost of purifying it or obtaining another water source in an arid state; the long-term health effects of increased pollution, both from mining and from associated boom town growth, and the resulting burden on Montana's health facilities; the effect on wildlife (including among other species the trout, elk, and ducks long prized by Montana sportsmen) of temporary or permanent disruption of the land

surface and associated streams: all these are impossible to estimate today with any reasonable precision.[9]

Also, the "cost" of even some well-known impacts depends on highly subjective judgments. A generation's worth of open strip mines, blasting, and fugitive dust in the atmosphere will be felt—and valued—very differently by an adjacent Montana rancher, by a Chicago tourist on a fishing vacation, and by appellants. The state's sense of subjective value, decided through its political process, will determine how hard it tries to avoid or repair those impacts, and thus how much it spends. One party might feel that the state's intended efforts are excessive, and another that they are inadequate, but trial now will not resolve their differences.

Finally, there are environmental and social impacts which are simply not yet known, and therefore not predictable at all. During World War II, for example, no one would have predicted that breathing asbestos in a Navy shipyard would cause a virulent form of cancer. What the analogous consequences of coal mining might be, or even whether they exist, is uncertain; but it is certain that, whatever they are, Montana will bear them.

Appellants attack Montana's use of a trust fund mechanism, arguing that by setting aside revenues for future use, the state concedes that it does not presently need them, and thus that there is no "fair relation" of tax revenues to governmental needs. Appellants' brief at 11, 30. Amici submit that the contrary is true. That Montana chooses to set aside substantial revenues in a trust fund, against the day when impacts will be better known, reflects its awareness of the present uncertainty; and it is a highly appropriate response by the state to the fact of that uncertainty. It, or a similar mechanism, may be the *only* way a state can "fairly relate" the tax on extraction of a nonrenewable resource to the impacts which that extraction will have over time. The Court should specifically endorse the

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[9] Experience is no guide. As the Montana Supreme Court pointed out below, strip mining in Montana has increased more than four-fold in the last ten years. 615 P. 2d at 849-850. Today's experience is therefore based on yesterday's much lower volume of extraction.

state's use of a trust fund, fed with revenues from the extraction of a non-renewable resources, to help insure that extraction costs which today are uncertain or unknown will be able to be met as they are recognized, both during the extraction process and later, after the resource—and the taxable activity—is irretrievably exhausted.

II. NO NATIONAL ENERGY POLICY CONFLICTS WITH MONTANA'S IMPOSITION OF A SEVERANCE TAX ON COAL DESIGNED TO COMPENSATE THE STATE FOR THE EFFECTS OF COAL MINING. FEDERAL POLICIES TOWARD ENERGY ARE EXPRESSED IN STATUTES WHICH SHOULD BE INTERPRETED BY THIS COURT.

Federal energy policy is not singular, it is diverse. Federal policies affecting energy production and use have been expressed in dozens of statutes, some of which appellants discuss, but most of which they ignore.[10] The crux of appellants' argument is that the Montana tax, because it increases the price to the user of Montana coal, interferes with what they contend is a Federal policy that favors the use of "low sulfur western coal over alternate forms of energy."[11] To prevail, appellants must show that such a policy exists, that Congress intended that policy to be effectuated, in part, by keeping the price of low sulfur western coal low, and that a tax that adds to the price of the coal the social, economic, and environmental costs of coal mining frustrates that policy. Appellants fail to meet that burden.

A. Federal policies toward energy are stated in many statutes designed to achieve diverse objectives. No uniform policy exists.

Historically, United States policy with regard to energy has been neither consistent nor coherent. For example, Federal laws have, at different times during this century, alternately

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[10] *Compare*, Brief of appellants at 5, n.*, 36-39, with list in n.16, *infra*.

[11] *Id.*, at 35.

discouraged and encouraged the importation of foreign oil.[12] For most of the last three decades, federal laws had the effect of massively subsidizing the use of conventional forms of energy;[13] recently, new laws have emphasized subsidies for less conventional sources of energy,[14] while allowing the price of conventional sources to rise to market levels in order to encourage increased production and to discourage consumption.[15] Since the oil embargo of 1973, Congress has enacted at least 26 separate laws dealing specifically with

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[12] *See generally* A. Sampson, THE SEVEN SISTERS at Ch. 8 (1975); ENERGY FUTURE at Ch. 2 (R. Stobaugh and D. Yergin, ed. 1979).

[13] *See generally* AN ANALYSIS OF FEDERAL INCENTIVES USED TO STIMULATE ENERGY PRODUCTION, Battelle Laboratories (1980). Battelle estimates that over $252 billion have been spent since 1918 to promote the production of oil, coal, natural gas, electricity and the construction of nuclear powerplants. *Id.*, Executive Summary at Table 1.

[14] *See, e.g.*, Crude Oil Windfall Profits Tax Act of 1980, Pub. L. 96-223, Title II, 94 Stat. 229 (1980); Energy Conservation and Production Act, Pub. L. 94-385, § 461, 90 Stat. 1125 (1976); Energy Policy and Conservation Act, Pub. L. 94-163, §§ 102, 363, 89 Stat. 871 (1975); Energy Security Act, Pub. L. 96-294, Titles I, II, V, 94 Stat. 611 (1980); Energy Tax Act of 1978, Pub. L. 95-618, §§ 221, 402, 92 Stat. 3174 (1978); Federal Nonnuclear Research and Development Act of 1974, 42 U. S. C. §§ 5905-5907; Geothermal Energy Research, Development, and Demonstration Act, 30 U. S. C. §§ 1141-1145, 1164; Magnetic Fusion Energy Engineering Act of 1980, 42 U. S. C. §§ 9301-9312 (1980); National Energy Conservation Policy Act, 42 U. S. C. §§ 8224, 8231, 8244; National Energy Extension Service Act, 42 U. S. C. § 7010; Ocean Thermal Energy Conversion Act, Pub. L. 96-310, § 10, 94 Stat. 941 (1980); Solar Energy Research, Development, and Demonstration Act of 1974, 42 U. S. C. § 5566; Solar Heating and Cooling Demonstration Act of 1974, 42 U. S. C. § 5517; Solar Photovoltaic Energy Research, Development, and Demonstration Act of 1978, 42 U. S. C. § 5594; Wind Energy Systems Act of 1980, Pub. L. 96-345, § 14, 94 Stat. 1139 (1980) *See, generally*, ENERGY POLICY IN PERSPECTIVE at 564-87 (Goodwin, ed. 1980).

[15] *See, e.g.*, Executive Order 12287, 46 Fed. Reg. 9909 (Jan. 30, 1981) (Decontrol of Crude Oil and Refined Petroleum Products); Pacific Northwest Electric Power Planning and Conservation Act, 16 U S. C. § 839 *et seq.*; Public Utilities Regulatory Policies Act of 1978, 16 U. S. C. § 2601 *et seq.* *See, generally*, ENERGY POLICY IN PERSPECTIVE, *supra* n. 14, at 564-587.

energy production and use.[16] They cover a wide variety of topics, but express no coherent policy.

Appellants would infer from three federal statutes a general policy favoring low-sulfur western coal at low cost although none of those statutes state any such policy specifically.[17] There is no reason, however, to examine only a few statutes relating to energy and ignore the majority in the endeavor to determine what, if any, general federal policy exists.

There are three themes that run, more or less consistently, through the various statutes that express federal energy concerns. They are the promotion of domestic energy production

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[16] Crude Oil Windfall Profits Tax Act of 1980, Pub. L. 96-223, 94 Stat. 229 (1980); Department of Energy Organization Act, 42 U.S.C. §§ 7101-7352; Emergency Energy Conservation Act of 1979, 42 U.S.C. §§ 8501-8541; Emergency Petroleum Allocation Act, 15 U.S.C. §§ 751-760h; Energy Conservation and Production Act, Pub. L. 94-385, 90 Stat. 1125 (1976); Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5891; Energy Policy and Conservation Act, Pub. L. 94-163, 89 Stat. 871 (1975); Energy Security Act, Pub. L. 96-294, 94 Stat. 611 (1980); Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246 (1974); Energy Tax Act of 1978, Pub. L. 95-618, 92 Stat. 3174 (1978); Federal Coal Leasing Amendments Act of 1975, Pub. L. 94-377, 90 Stat. 1083 (1976); Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. §§ 5901-5917; Geothermal Energy Research, Development, and Demonstration Act of 1974, 30 U.S.C. §§ 1101-1164; Magnetic Fusion Energy Engineering Act of 1980, 42 U.S.C. §§ 9301-9312 (1980); National Energy Conservation Policy Act, 42 U.S.C. §§ 8211-8278; National Energy Extension Service Act, 42 U.S.C. §§ 7001-7011; Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432; Ocean Thermal Energy Conversion Act, Pub. L. 96-310, 94 Stat. 941 (1980); Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. 96-501, 94 Stat. 2697 (1980); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289 (1978); Public Utilities Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3117 (1978); Solar Energy Research, Development, and Demonstration Act of 1974, 42 U.S.C. §§ 5551-5566; Solar Heating and Cooling Demonstration Act of 1974, 42 U.S.C. §§ 5501-5517; Solar Photovoltaic Energy Research, Development, and Demonstration Act of 1978, 42 U.S.C. §§ 5581-5594; Surface Mining and Reclamation Act of 1977, 30 U.S.C. § 1201; Wind Energy Systems Act of 1980, Pub. L. 96-345, 94 Stat. 1139 (1980).

[17] The statutes upon which appellants rely do not establish even a general policy in favor of western low sulfur coal at low cost. *See* Section II.C., *infra*.

from all sources,[18] the encouragement of improved efficiency in energy use,[19] and the assurance that energy production and use

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[18] *See e.g.*, Crude Oil Windfall Profits Tax of 1980, Pub. L. 96-223, Title II, 94 Stat. 229 (1980); Department of Energy Organization Act, 42 U. S. C. §§ 7111-7112; Energy Conservation and Production Act, Pub. L. 94-385, §§ 121-124, 90 Stat. 1125 (1976); Energy Reorganization Act of 1974, 42 U. S. C. § 5801; Energy Policy and Conservation Act, Pub. L. 94-163, §§ 101-106, 89 Stat. 871 (1975); Energy Security Act, Pub. L. 96-294, Titles I, II, IV, V, 94 Stat. 611 (1980); Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, § 2, 88 Stat. 246 (1974); Energy Tax Act of 1978, Pub. L. 95-618, §§ 221, 402, 92 Stat. 3174 (1978); Federal Coal Leasing Amendments Act of 1975, Pub. L. 94-377, 90 Stat. 1083 (1976); Federal Nonnuclear Energy Research and Development Act of 1974, 42 U. S. C. §§ 5901-5904; Geothermal Energy Research, Development, and Demonstration Act, 30 U. S. C. §§ 1101-1164; Magnetic Fusion Energy Engineering Act of 1980, 42 U. S. C. §§ 9301-9312 (1980); National Energy Conservation Policy Act, 42 U. S. C. §§ 8271-8278; National Energy Extension Service Act, 42 U. S. C. §§ 7003-7007; Natural Gas Policy Act of 1978, 15 U. S. C. §§ 3301-3432; Ocean Thermal Energy Conversion Act, Pub. L. 96-310, §§ 2-10, 94 Stat. 941 (1980); Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. 96-501, § 2, 94 Stat. 2697 (1980); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, § 102, 92 Stat. 3289 (1978); Public Utilities Regulatory Policies Act of 1978, Pub. L. 95-617, §§ 210, 401-408, 92 Stat. 3117 (1978); Surface Mining and Reclamation Act of 1977, 30 U. S. C. §§ 1201-1202 (1977); Solar Photovoltaic Energy Research, Development, and Demonstration Act of 1978, 42 U. S. C. §§ 5581-5594.

[19] Crude Oil Windfall Profits Tax Act of 1980, Pub. L. 96-223, Title II, 94 Stat. 229 (1980); Department of Energy Organization Act, 42 U. S. C. §§ 7111-7112; Emergency Energy Coordination Act of 1979, 42 U. S. C. §§ 8501-8541; Emergency Petroleum Allocation Act, 15 U. S. C. §§ 751-760h; Energy Conservation and Production Act, Pub. L. 94-385, §§ 301-451, 90 Stat. 1125 (1976); Energy Policy and Conservation Act, Pub. L. 94-163, Titles III, V, 89 Stat. 871 (1975); Energy Reorganization Act of 1974, 42 U. S. C. § 5801; Energy Security Act, Pub. L. 96-294, Title V, 94 Stat. 611 (1980); Energy Tax Act of 1978, Pub. L. 95-618, §§ 101, 210, 222, 231, 232, 233, 241, 242, 92 Stat. 3174 (1978); Federal Nonnuclear Energy Research and Development Act of 1974, 42 U. S. C. § 5904; National Energy Conservation Policy Act, 42 U. S. C. §§ 8211-8261; National Energy Extension Service Act, 42 U. S. C. §§ 7003, 7007; Natural Gas Policy Act of 1978, 15 U. S. C. §§ 3301-3432; Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. 96-501, §§ 2, 6, 94 Stat. 2697 (1980); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, § 102, 92 Stat. 3289 (1978); Public Utilities Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3117 (1978).

will not cause serious injury to the human environment.[20] In addition, federal laws and executive orders have recently stressed the importance of letting prices rise, both to reflect true market prices for energy and to allow the environmental and social costs of energy production to be internalized in energy prices.[21]

Most surprisingly, appellants fail to cite the Energy Security Act of 1980, Pub L. 96-294, 94 Stat. 611, Congress's most recent and one of its most comprehensive efforts to deal with energy problems on a broad scale. The Energy Security Act is a good illustration of the wide range of topics that Congress considers to be part of its approach to energy problems. The Act includes programs for synthetic fuels, § § 101-195; energy from biomass, § § 201-274; solar energy and energy con-

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[20] *See, e.g.*, Department of Energy Organization Act, 42 U. S. C. §§ 7111-7112; Energy Conservation and Production Act, Pub. L. 94-385, § 402, 90 Stat. 1125; Energy Reorganization Act of 1974, 42 U. S. C. § 5801; Energy Security Act, Pub. L. 96-294, §§ 601-644, 94 Stat. 611 (1980); Federal Coal Leasing Amendments Act of 1975, Pub. L. 94-377, 90 Stat. 1083 (1976); Federal Nonnuclear Energy Research and Development Act of 1974, 42 U. S. C. § 5901; Geothermal Energy Research, Development, and Demonstration Act, 30 U. S. C. § 1161; Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. 96-501, § 2, 94 Stat. 2697 (1980); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, § 102, 92 Stat. 3289 (1978); Solar Heating and Cooling Demonstration Act of 1974, 42 U. S. C. § 5501; Surface Mining Control and Reclamation Act, 30 U. S. C. §§ 1201, 1251-1279; Wind Energy Systems Act of 1980, Pub. L. 96-345, § 2, 94 Stat. 1139 (1980). In addition to energy statutes with specific references to environmental protection, several environmental protection laws directly and indirectly affect energy conservation and production. *See, e.g.*, Clean Air Act, as amended, 42 U. S. C. §§ 7401-7642; Clean Water Act Amendments to the Federal Water Pollution Control Act, 33 U. S. C. §§ 1251-1376; National Environmental Policy Act of 1969, as amended, 42 U. S. C. §§ 4321-4361; Resource Conservation and Recovery Act of 1976, 42 U. S. C. §§ 6901-6987; Uranium Mill Tailings Radiation Control Act of 1978, 42 U. S. C. §§ 7901-7942.

[21] *See, e.g.*, H. Rep. No. 95-218, 95th Cong., 1st Sess., *reprinted in* 1977 U. S. CODE CONG. & AD. NEWS 593, 599 (Surface Mining and Reclamation Act); H. Rep. No. 95-294, 95th Cong., 1st Sess., *reprinted in* 1977 U. S. CODE CONG. & AD. NEWS 1077, 1150-51 (Clean Air Act Amendments of 1977); *cf.*, S. Rep. No. 95-141, 95th Cong., 2d Sess., *reprinted in* 1978 U. S. CODE CONG. & AD. NEWS 7660, 7679 (Public Utilities Regulatory Policies Act).

servation, § § 501-597; geothermal energy, § § 601-744; and the study of environmental problems, § § 701-712.

B. Federal statutes relating to energy generally, and coal in particular, firmly link development with environmental considerations, and with prices high enough to meet multiple goals.

The theme of environmental protection found in federal statutes relating to energy is particularly relevant, because the regulatory standards imposed by the Congress to protect the environment frequently have the effect of raising the price of energy resources. Congress has recognized that normal economic forces—supply, demand, price, and competition—do not operate to protect the environment, and consequently regulatory measures are necessary.[22] Although the effect of those measures may be to increase the price of energy, the higher prices more accurately communicate to energy consumers the real cost to the Nation of the energy they use. As the then Chairman of the Council on Wage and Price Stability explained in Congressional testimony:

> With our recently enhanced recognition of the many ways in which unrestrained economic activities may impose damage on the environment. . . . it is widely recognized that economic efficiency alone requires that all pertinent social costs, internal and external, be levied in one way or another on the particular acts of production or consumption causally responsible for them. This will eliminate the subsidization; by confronting consumers with prices reflecting the full social costs of supplying them, it will ensure that no activities will be carried on whose *total* incremental costs exceed their benefits. And it will ensure, also, that production will be carried on by methods that minimize *total* costs, rather than only those costs that happen to fall on the producer.[23]

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[22] *See* sources listed supra, n. 21.

[23] Executive Branch Review of Environmental Regulations; Hearing before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works of the United States Senate, 96th Cong., 1st Sess. 406 (Statement of Alfred Kahn). *See also* Allen Kneese and Charles Schultze, POLLUTION PRICES AND PUBLIC POLICY (1975) at 5-6.

This policy of internalizing the environmental and social costs of energy production and use is applied to coal by many federal statutes.[24]

The federal statute most directly concerned with the mining of coal is the Surface Mining Control and Reclamation Act of 1977, 30 U. S. C. §§ 1201 *et seq.* (Supp. III 1979), which appellants unaccountably do not discuss. The Surface Mining Act explicitly states Congress's intention to "strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy", § 102(f), 30 U. S. C. § 1202(f), and to "assure that surface coal mining operations are so conducted as to protect the environment," § 102(d), 20 U. S. C. § 1202(d). In achieving this goal, Congress stated that "the primary governmental responsibility" in this area "should rest with the States." § 101(f), 30 U. S. C. § 1201(f). Congress expressly authorized states to adopt standards regulating surface mining which are more stringent (and therefore more costly to comply with) than the minimum standards set by the Act.[25] Thus, Congress has acknowledged and approved state policies fashioned to remedy environmental harms which increase the price of coal.[26]

C. The statutes relied upon by Appellants do not manifest a Congressional policy favoring low sulfur western coal at the lowest possible price.

Appellants rely specifically upon three statutes to support their contention that federal policy requires that the price of Montana coal be kept as low as possible. The most directly

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[24] *See, e.g.* Surface Mining Control and Reclamation Act, *supra;* Federal Coal Leasing Amendments Act, 30 U. S. C. §§ 181 *et seq.;* Federal Land Policy and Management Act of 1976, 43 U. S. C. § 1701 *et seq.;* Federal Mine Safety and Health Act of 1977, 30 U. S. C. § 801 *et seq.*

[25] 30 U. S. C. § 1225. The Clean Air Act allows the states similar discretion in deciding whether to meet or exceed Federal standards. 42 U. S. C. § 7416.

[26] Moreover, in managing its own coal resources, the federal government is required by law to seek maximization of its economic returns rather than to set low prices to promote development. Federal Coal Leasing Amendments Act, *supra* n. 20, 30 U. S. C. §§ 201, 207 (1975). This policy was adopted in response to evidence that too much federal coal was being leased at too low a price. H. Rep. No. 94-681, 94th Cong., 1st Sess., 8-12 (1975).

relevant of those statutes, the Clean Air Act, in fact strongly indicates that Congress did *not* intend to favor western coal. The promulgation of uniform national emission standards by the Environmental Protection Agency under the original version of the Act, Pub. L. 91-604, 84 Stat. 1676 (1970), resulted in low sulfur western coal enjoying a significant advantage over high sulfur eastern coal. H.Rep.No. 294, 95th Cong., 1st Sess., 184-87 (1977). In reaction to this situation, Congress amended the Act in 1977 to "strengthen incentives for new plants to use locally available coal." *Id.* at 166. The clear purpose of this change was to eliminate the advantage enjoyed by western coal, not to promote its use at cheap prices.[27]

The other statutes relied upon by appellants simply do not address either the price or the geographical origin of coal. Rather they emphasize a variety of mechanisms to reduce consumption of oil and natural gas.[28]

D. Even assuming arguendo that there is a discernible policy to favor coal development over other values and alternatives, Montana's tax should be upheld without trial.

As discussed above in the context of the Commerce Clause, Montana's tax offers no hindrance in practice to the interstate flow of its coal. Thus, even if federal policy favors the

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[27] *See*, Ayres & Doniger, *New Source Standard for Power Plants II: Consider the Law*, 3 HARV. ENV. L. REV. 63, 66-67 (1979).

[28] First, the Energy Policy and Conservation Act of 1975, 42 U. S. C. §§ 6201 *et seq.* (1976 & Supp. III 1979), does not mention coal in its statement of purposes. Instead, like the Energy Security Act, it establishes an assortment of programs dealing with energy conservation, Title III oil prices, Title IV, and emergency planning, Title II. Appellants emphasize one section, which merely strengthens the requirement in an earlier statute that certain gas and oil burning facilities be converted to coal. Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246 § 2, 15 U. S. C. § 792 (1976 and Supp. III 1979). The earlier statute was intended to help meet the need for fuels "in a manner which is consistent, to the fullest extent practicable, with existing National commitments to protect and improve the environment." § 1(b), 15 U. S. C. § 791(b).

The second statute relied upon by appellants, the Power Plant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289, 42 U. S. C. §§ 8301 *et seq.* (Supp. III 1979), likewise incorporates multiple purposes. It focuses on reduction of oil imports through conservation.

development and use of western low sulfur coal, Montana's tax does not constitute "substantial frustration" of that policy because Montana coal is being developed and used.

A trial on this question would be inappropriate, for the issue is whether the Montana tax "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941). What the "purposes and objectives of Congress" are with respect to energy is a question of law to be resolved by reference to statutes and legislative history, not a factual issue to be resolved at trial.

If the federal policy appellants claim to find—favoring western coal development at low cost over other considerations—were in fact the clear intention of Congress, the question would remain as to what level of state taxes could be imposed without substantially impairing that policy. Appellants argue that Congress has implicitly set such a limit, and seek trial to determine it. But Congress during 1980 failed to pass legislation that would have set explicit limits on state coal severance taxes. H.R. 6625, H.R. 6654, H.R. 7163, 96th Cong. 2d Sess. (1980). Similar legislation is now pending. S. 178, 97th Cong., 1st Sess. (1981). Thus, to justify a trial, appellants seek to persuade this Court that Congress has already done by implication what it has chosen not to do expressly. Appellants would then have a trial court do exactly what Congress has declined to do: determine what specific state tax rate is appropriate.

In effect, appellants ask for special attention in this case because the subject is energy. They stress the Arab oil embargo of 1973, the resulting atmosphere of energy crisis, and the spectre of "energy rich states" exploiting their dependent kin. Appellants' brief at 24-25. But the rhetoric of energy crisis is nothing new, even in this exact legal context. Nine states raised exactly these same arguments almost sixty years ago in *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245 (1921). The debate over energy policy is of vital importance, but resolution of this case does not require the development of new or *ad hoc* constitutional principles.

CONCLUSION

The record before the Court in this case demonstrates that Montana's coal severance tax is non-discriminatory, and that in practical effect it is not hindering interstate commerce in Montana coal. The tax is therefore constitutional.

In the absence of any practical burden on interstate commerce, no set of facts could be proven at trial that would show the burden of the tax to be clearly excessive, in relation to the burdens imposed on the state. The "fairly related" test is therefore satisfied. Trial on the issue would *unduly and unnecessarily restrict* the legislative judgment of the state in assessing the present and future burdens of coal extraction, without leading to any more satisfactory precision in quantifying those burdens.

Montana's use of a trust fund to set aside revenue for future impacts is a highly appropriate response to the problems of uncertainty and unpredictability, and should be encouraged.

To the extent that any conherent national policy with respect to coal can be discerned, it is to balance coal development with other energy sources and with environmental factors, allowing energy prices to reflect the full cost of the resource including the cost of environmental protection, and granting wide latitude to the states to set the conditions for coal development. Montana's tax is wholly consistent with that policy. Even if the policy were otherwise, the demonstrated lack of interference with the flow of Montana coal in interstate commerce is enough to show that the tax is not operating to frustrate the development and use of Montana coal throughout the nation.

The judgment below should therefore be affirmed.

Respectfully submitted,

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Dated: February 23, 1981

Appendix

DESCRIPTION OF AMICI

1. Amicus Environmental Defense Fund, Inc. (EDF) is a not-for-profit, public interest membership corporation, organized and existing under the laws of the state of New York, with its principal place of business located at 475 Park Avenue South, New York, N.Y. 10016, and with additional offices in Washington, D.C., Denver, Colorado, and Berkeley, California. EDF has more than 45,000 members nationwide.

EDF is dedicated to the protection and rational use of natural resources and to the preservation and enhancement of the human environment. It and its staff of scientists, economists, and lawyers seek to pursue these goals through scientific research, monitoring, and administrative and judicial action on behalf of itself and its members.

2. Amicus Natural Resources Defense Council, Inc. (NRDC)—a national environmental organization with more than 44,000 members residing in all states and territories, as well as abroad—has as one of its principle goals the preservation and wise use of the natural resources of the earth, including those resources such as clean air and clean water held in common by all people. NRDC has sought, through the advocacy of effective federal, state, and local laws, to assure that those commonly held resources are protected.

3. Amicus Sierra Club is a non-profit corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business at 530 Bush Street, San Francisco, California 94108. The Sierra Club is a national conservation organization having approximately 188,000 members.

The objectives of the Sierra Club include conservation, the protection and sound management of natural resources, and the preservation and enhancement of our environment. The stated corporate purposes of the Sierra Club are:

> To enhance and protect by all lawful means the natural resources and human environment of the United States

and the earth in general; to explore, enjoy, and preserve the scenic resources of the United States and its forests, waters, wildlife and wilderness; to undertake and to publish scientific, literary, and educational studies concerning them; to educate the people with regard to the national and state forests, parks, monuments, and other natural resources of especial scenic beauty and to enlist public interest and cooperation in protecting them.

For many years the Sierra Club has fostered these objectives by its activities, including the representation of its members and persons similarly situated before courts and administrative agencies.